159 U S 596

27

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~938~~ 552

A. F. McDOWELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED MARCH 11, 1895.

(15,822.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 19, 1895.

1 United States Circuit Court of Appeals, Fourth Circuit.

A. F. McDOWELL, Plaintiff in Error,
vs.
THE UNITED STATES. } No. 82.

In error to the district court of the United States for the district of South Carolina.

This is to certify that a vacancy existed in the office of district judge of the United States for the district of South Carolina from January 1, 1894, to February 12, 1894; that the regular terms of the district court for the western district of said district, at Greenville, were and are fixed by law to be held on the first Mondays of February and August (26 Stat., 71, c. 165), and that the first Monday of February, 1894, fell on the fifth day of that month. On January 30, 1894, the following order was made by the Hon. Charles H. Simonton, one of the circuit judges for the fourth circuit, which was duly filed in the clerk's office:

"THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court.

It appearing to me by the certificate of the clerk, under the seal of the court, this day filed that there is such an accumulation of business and urgency for the transaction thereof in the district court for the western district of this State, and that the public interests require the designation and appointment of a district judge within this circuit to hold the regular term of this court beginning on the first Monday of February, 1894, at Greenville, South Carolina:

2 Now, therefore, in consideration of the premises and on motion of the United States attorney, I do hereby designate and appoint the Honorable Augustus S. Seymour, judge of the district court of the United States for the eastern district of North Carolina, the same being in the fourth circuit, to hold and preside over the said term of court, and to have and to exercise within the western district of South Carolina the same powers that are vested in the judge of the said district."

In pursuance of said order the Hon. Augustus S. Seymour, district judge, as aforesaid, held and presided over the regular term of the United States district court for the western district of South Carolina, at Greenville, South Carolina, from the fifth day of February, 1894, to the twelfth day of that month, on which day the Hon. William H. Brawley, appointed and duly commissioned as district judge of the United States for the district of South Carolina, qualified as such and entered upon the discharge of his official duties, and held and presided at the term of the district court at Greenville, South Carolina, from that day until after the conclusion of the proceedings herein set forth. On February 16, 1894, an in-

dictment was returned into said court against A. F. McDowell, who had theretofore been the postmaster of the post office at Walker, in Spartanburg county, in the State of South Carolina, for making as such postmaster a false and fraudulent return to the auditor of the business of his office for the quarter ending on the thirtieth day of September, 1893, including the said month of September, for the purpose of fraudulently increasing his compensation, upon which indictment McDowell was tried February 21 and 22, 1894, and a verdict of guilty returned by the jury. A motion for new trial was overruled February 23. Thereupon and before sentence McDowell made a motion in arrest of judgment on the ground that the
3 indictment had been found and the subsequent proceedings had thereon at what was not a lawful term of court, and that said indictment and subsequent proceedings were consequently void; which motion in arrest was overruled and McDowell sentenced to pay a fine of $500 or be imprisoned in the jail of Spartanburg county, South Carolina, for six months. The making of the motion in arrest and its disposition appear in the record in a bill of exceptions, which refers to the indictment as found by "the grand jury empannelled at the special February term of said court, at Greenville, at the district aforesaid," and the statement of the matter upon which the motion in arrest was founded commences: "At the opening of the special February term, 1894, of said court, that being the term at which said indictment was found;" but the record nowhere discloses the calling of any special term as such. The cause was then taken by McDowell on error to the circuit court of appeals of the United States for the fourth circuit, McDowell being admitted to bail, and various errors assigned on exceptions preserved to the admission of evidence, as set forth in the bill of exceptions, and also to the overruling of the motion in arrest of judgment. The cause having been submitted on printed briefs at the February term, 1895, of the said circuit court of appeals for the fourth circuit, before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States on certain questions or propositions of law arising in said case:

Now, therefore, we, the undersigned, do hereby certify said questions or propositions of law arising in said cause to the Su-
4 preme Court of the United States for instruction as aforesaid:

1. Whether plaintiff in error was indicted, convicted, and sentenced at a lawful term of the district court for the district of South Carolina and the western district thereof, sitting at Greenville, as set forth in this certificate?

2. Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment?

As witness our hands this twelfth day of February, A. D. 1895.

(Signed) MELVILLE W. FULLER,
Chief Justice of the United States, Allotted to Fourth Circuit.
NATHAN GOFF,
United States Circuit Judge, Fourth Circuit.

UNITED STATES OF AMERICA, }
Fourth Circuit. }

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the original certificate made and filed in the said circuit court of appeals the 12th day of February, 1895, in the therein-entitled cause, and ordered by said court to be transmitted to the
5 Supreme Court of the United States for its action thereon.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 23rd day of February, A. D. 1895.

Seal United States Circuit Court of Appeals, Fourth Circuit.

HENRY T. MELONEY,
Clerk United States Circuit Court of Appeals for the Fourth Circuit.

Endorsed on cover: Case No. 15,822. U. S. circuit court of appeals, fourth circuit. Term No., 938. A. F. McDowell, plaintiff in error, *vs.* The United States. (Certificate.) Filed March 11th, 1895.

Office Supreme Court U.S.
FILED.
APR 6 1895
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

A. F. McDOWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

No. 938. 552

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

A. F. McDOWELL, PLAINTIFF IN error,
v.
THE UNITED STATES.
No. 938.

MOTION TO ADVANCE.

During a vacancy in the judgeship of the district court of the United States for the district of South Carolina, on January 30, 1894, Judge Simonton, circuit judge, made an order designating Judge A. S. Seymour, judge of the district court of the United States for the eastern district of North Carolina, to hold the regular term of the said district court of South Carolina beginning on the first Monday of February, 1894, at Greenville, S. C. Judge Seymour held court from February 5 to February 12, when Judge William H. Brawley qualified and entered on the discharge of his official duties.

On February 16, 1894, an indictment was returned, in the district court of the United States for the district of South Carolina, against the defendant for making, as postmaster at Walker, S. C., a false and fraudulent return to

the Auditor of the business of his office, for the purpose of fraudulently increasing his compensation as such postmaster, and on trial was found guilty.

After a motion for a new trial was overruled, a motion in arrest of judgment was made, on the ground that the indictment was found and the subsequent proceedings had thereon at what was not a lawful term of court, and that the indictment and proceedings were void. The motion was overruled, and McDowell sentenced to pay a fine of $500 and be imprisoned in jail for six months. The case was taken to the circuit court of appeals for the fourth circuit, and McDowell admitted to bail. The circuit court of appeals have certified the following questions to this court for instructions:

> 1. Whether the plaintiff in error was indicted, convicted, and sentenced at a lawful term of the district court for the district of South Carolina and the western district thereof, sitting at Greenville, as set forth in this certificate?
>
> 2. Whether the question as to the validity of the indictment and proceedings against the plaintiff in error was open to consideration on motion in arrest of judgment?

The Solicitor-General respectfully moves the court to advance the case upon the docket, and set it down for hearing at such day during the next term as may be convenient to the court.

Notice of this motion has been served on the counsel for the defendant, and proof filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

FILED.
OCT 16 1895
JAMES H. McKENNEY,
CLERK.

552

UNITED STATES SUPREME COURT.

QUESTIONS OF LAW,

CERTIFIED FROM CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

A. F. McDOWELL, Plaintiff in Error,

VERSUS

THE UNITED STATES, Defendant in Error.

IN ERROR TO

The District Court of the United States for the District of South Carolina.

BRIEF.

J. ALTHEUS JOHNSON,
For Plaintiff in Error.

UNITED STATES SUPREME COURT.

QUESTIONS OF LAW,

CERTIFIED FROM CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

A. F. McDOWELL, Plaintiff in Error,

VERSUS

THE UNITED STATES, Defendant in Error.

IN ERROR TO

The District Court of the United States, for the District of South Carolina.

BRIEF.

J. ALTHEUS JOHNSON,
For Plaintiff in Error.

STATEMENT.

The substance of the facts, including those of which the Court takes judicial cognizance as well as those disclosed by the record, is as follows: On January 1st, 1894, the Honorable Charles H. Simonton resigned the office of District Judge for South Carolina and, on the same day, qualified as Circuit Judge of the Fourth Circuit. His successor, the Honorable W. H. Brawley, qualified as District Judge on February 12, 1894. A vacancy, therefore, existed in the office of District Judge for South Carolina from January 2, 1894, to February 12, 1894. The terms for the District Court for said District are fixed by law on the first Mondays in

February and August. (Act Congress, 26th April, 1890.) The first Monday in February, 1894, fell on the 5th day of the month. On January 30, 1894, Circuit Judge Simonton, at his Chambers, appointed the Hon. A. S. Seymour, District Judge for the Eastern District of North Carolina, to hold the February term, 1894, of the District Court of South Carolina, there being a vacancy in the Judgeship of the latter District. In pursuance of the aforesaid order of Circuit Judge Simonton, Judge Seymour opened the District Court at Greenville, South Carolina, the place of holding Courts in said District, on the first Monday in February, 1894, it being the fifth day of the month, and presided till the 12th day of February, 1894, when Judge Brawley qualified and presided the residue of the term, Judge Seymour ceasing to preside when Judge Brawley began. During this term, and after Judge Brawley assumed charge, plaintiff in error was indicted, tried, convicted and sentenced for an offense not infamous.

From this judgment, appeal was taken to the Circuit Court of Appeals. By order of that Court the following questions of law were certified to the Supreme Court, to wit:

1. Whether plaintiff in error was indicted, convicted and sentenced at a lawful term of the District Court for the District of South Carolina, and Western District thereof, sitting at Greenville, as set forth in this certificate.

2. Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment.

I.

Whether the plaintiff was indicted, convicted and sentenced at a lawful term of the District Court for the District of South Carolina, and the Western District thereof, sitting at Greenville, as set forth in this certificate.

1. Judge Simonton had no legal authority to appoint Judge Seymour to hold the Court, there being then a vacancy in the District Judgeship for South Carolina.

2. Moreover, the Court could not lawfully be held, there being such vacancy in the District Judgeship on February 5th, 1894, the time fixed by law for the opening of the Court, and all causes were continued by operation of law till the next regular term, to wit: the first Monday in August, 1894.

1. Circuit Courts are creatures of Statute. Their jurisdiction is special and limited. They have no general common law jurisdiction. Their powers are, therefore, strictly construed.—4 Crouch, 75; 7 *Idem*, 32; 8 How., 441; *Jones* v. *U. S.*, 137 U. S., 211; *Manchester* v. *Mass.*, 139 U. S., 240; *U. S.* v. *Eaton*, 144 U. S., 677.

This being the rule as regards Circuit Courts, *a fortiori* it should apply in the case of Circuit Judges at Chambers. No appointment could have legally been made in this case, whether by one or by both of the Circuit Judges. Clear authority must be shown to authorize this great power. No such power exists in case of a vacancy in a District Judgeship. It is admitted that such vacancy existed when the appointment was made. The only authority for such power is found in Sections 591, 592, 596 U. S. R. S. An examination of these Sections clearly reveals the fact that the case of a vacancy is not included within their provisions.

(*a*) Section 591 contemplates not a *vacancy*, but a *disability*. U. S. Attorney General Black in the year 1858, (9 Opinions Attorneys General, 131) held that the power to designate a District Judge to hold Court in case of a disability under this Section did not extend to the case of a vacancy.

Ball v. *U. S.*, 140 U. S., 128.

But, since, by the very terms of the order of Judge Simonton making the appointment in this case, there is no intimation that it is claimed by virtue of Section 591, case of a disability, it is useless to say more in reference to it.

(*b*) Section 592 contemplates an accumulation or urgency of business in any District and the lack of capacity on the part of the Judge thereof to transact it seasonably. It clearly negatives the idea of a vacancy existing therein, as the concluding part of the Section in the following words shows: "Each of the said District Judges (*i. e.*, the resident Judge and the one specially appointed) may hold separately and at the same time a District or a Circuit Court therein."

(*c*) Section 596 contemplates that when any contingency arises to warrant the appointment of another District Judge to hold any Court "in place of or in aid of" the resident Judge it is competent to do so. The words "in place or in aid of" negative the idea of a vacancy. But it refers evidently to a case, for instance, where the resident Judge may be holding a Court and important causes involving difficult points of law are to be

tried, and he may need another Judge "in aid of him" to preside with him. Or, to cases where the Circuit and District Courts are in session at the same time, and the resident Judge needs an additional Judge to hold one of them "in place of him."

(*d*) But apart from the fact that the Sections in question confer no authority for any appointment of another District Judge to preside in a District, not his own, *in case of a vacancy therein*, but, on the contrary, negative any such idea, provision is expressly made for such contingencies by Sections 602 and 603, in which, in effect, it is declared that no such appointment shall be made. Section 602 is to the effect that, in the event of a District in a State containing only one District, all matters are "continued until the next stated term after the vacancy is filled." And Section 603 is to the effect that, when a vacancy occurs in a District in a State containing more than one District, such Judge of such other District shall perform the duties of the Judge in the District wherein the vacancy happens during such vacancy. Of course if Judge Seymour had no authority to organize the Court and Grand Jury on February 5th, 1894, Judge Brawley had no power to preside at any other time during the term. When the Judge is not present at the beginning of the session, the Court can then be continued *only by his written order directed to the Marshal*. This is when there is no vacancy. —U. S. R. S., Section 583.

But if there is a vacancy in the Judgeship, by the operation of law all matters are continued *on that day, the first day of the Session—till* the next regular term after the vacancy is filled.—U. S. R. S., Sections 602, 603.

2. But waiving the question of the want of authority on the part of Judge Simonton to appoint Judge Seymour, and admitting, for the sake of the argument, that Judge Seymour was a *de facto* Judge, whose acts are not open to collateral attack—and it cannot be denied that our Courts, on the score of necessity, convenience and public policy, uphold the acts of *de facto* officers so far as concerns the public and third persons—then it is submitted with confidence that the whole proceedings are void *ab initio*, for the reason that the Court had been continued by operation of law (Section 602, R. S. U. S.) to the August term, 1894, of the Court. In other words, the contention is that, there being a vacancy in the District Judgeship on the 5th day of February, 1894, the time prescribed by law for

the holding of the Court—and on which day Judge Seymour convened it—all matters pending therein were continued till the August term, and therefore this Court was held at a time not authorized by law. From the organization of the Federal Courts by the Judiciary Act of September 24th, 1789, down to August 6th, 1861, there was not only no provision for holding, under any exigency whatever, any District Court where there was a vacancy in the District Judgeship, but there was an absolute prohibition against it. By the express provisions of that Act, all causes pending in such Court were continued till the next stated term after the vacancy was filled. It is incorporated as Section 602, U. S Rev. Stat., and is as follows: "*When the office of Judge of any District Court is vacant, all process, pleadings and proceedings pending before such Court shall be continued of course until the next term after the appointment and qualification of his successor; except when such first mentioned term is held as provided in the next Section.*"

But by the Act of Congress of August 6th, 1861, this law was amended by providing that, when a vacancy occurred in a District in any State containing two or more Districts the Judge of either of the other Districts was authorized to discharge all the judicial duties of such Judge during such vacancy. This Act is incorporated as Section 603, U. S. R S., and is as follows: "When the office of District Judge is vacant in any District in a State containing two or more Districts, the Judge of the other or either of the other Districts may hold the District Court where the vacancy occurs and discharge all the judicial duties of Judge of such District during such vacancy." Therefore, as the law now stands, when the office of Judge of any District Court is vacant in a State containing only one Judicial District, no District Court can be held therein till the next regular term after the vacancy is filled. And where the vacancy occurs in a Judicial District in a State containing more than one Judicial District, then one of the Judges of either of the other Districts may hold the Courts therein.

The State of South Carolina contains two Districts (Section 546 U. S. R. S.), yet one Judge is the Judge of both (Section 552, U. S. R. S.), and hence, so far as the question under consideration is concerned, there is, in effect, practically, but one District therein—there being but one Judge for both Districts.

There is no dispute as to a vacancy existing in the District Judgeship of South Carolina from January 1, 1894, to February

12, 1894. It is not denied that the times for holding the District Court in said District are on the first Mondays in February and August in every year [Act Cong. April 26, 1890.] It is conceded that the first Monday in February, 1894, was the fifth day of that month—showing that the vacancy existed when Judge Seymour convened the Court. The conclusion is, therefore, irresistible that when the time arrived for holding the Court at Greenville, S. C., on February 5, 1894, by operation of law (Section 602, U. S. Rev. Stat.) the Court was continued till the next stated term after the qualification of Judge Brawley, namely, the first Monday in August, 1894. It follows necessarily that it was held at a time not authorized by law and that the whole proceedings are absolutely null and void and of no effect whatsoever.

The authorities are abundant and uniform to the effect that a Court held at a place, *but not at a time*, authorized by law, is *coram non judice* and void—I. Bish. Cr. Pr., Sections 360, 860; *Ex parte De Hay*, 3 S. C., 564; *Ex parte Lilly*, 7 S. C., 372; *Brumley* v. *The State*, 20 Ark., 77.

In *Brumley* v. *The State*, 20 Ark., 77, the Court says:

"The meeting together of the Judge and officers of the Circuit Court at this place, but not at the time, fixed by law for holding the Court, is not a Court under our laws, and their acts, as such, must be regarded as *coram non judice*."

Plaintiff in error is not unmindful of the salutary rule of law that so far as third persons and the public are concerned the acts of a Judge *de facto* are often validated. This is on the score of public policy, convenience and necessity. But this wholesome provision is inapplicable in this case, for the reason that *here* the judgment is challenged because the Court was held at a time not authorized by law. Acts of even a *de jure* Judge are *coram non judice* when the Court is held *at a time not authorized by law.*

A fortiori is this the case when it is held by a Judge *de facto.* See authorities before.

The rule enunciated in *Ball* v. 140 U. S., 118, 128, does not militate against the view herein announced. On the contrary, they are clearly distinguishable:

(*a*) *There*, Judge Boardman was appointed by reason of the disability of Judge Sabin; here, Judge Seymour was appointed during a *vacancy.*

(*b*) *There*, Judge Boardman held the *Circuit Court; here*, Judges Seymour and Brawley held the District Court.

(*c*) *There*, were three Districts in the State—Texas; and the Court could be held under Section 603 U. S. Rev. Stat. *Here*, there was only one District, practically, and Section 603 has no application.

(*d*) *There*, the Defendant was indicted, tried and convicted during Judge Sabin's *disability*. *Here*, the Court was organized during the *vacancy*.

(*e*) In the *District Court*, by operation of Section 602 U. S. R. S., no Court can, under any contingency, be held in any District during the vacancy in the District Judgeship, nor *till the next regular term after the vacancy is filled*. But the rule is otherwise in the Circuit Court. On the contrary, when an office of District Judge is vacant there is nothing to prevent the Circuit Justice, the Circuit Judge or an imported District Judge from holding a *Circuit Court*. In Texas, there being three Districts, it would have been competent for the District Court to have been held by a *de facto* Judge, because any of the Judges in any of the Districts could have held the Court, even without appointment, by virtue of Section 603 U. S. R. S. But in South Carolina, there being but one District, practically, no Court could have been held at all.

The Court not being legally constituted, the plaintiff in error was illegally convicted, judgment against him should have been arrested, and all proceedings had against him at the alleged term of Court should be declared null.

Want of jurisdiction in the Court below does not prevent this Court from assuming jurisdiction on appeal for the purpose of reversing the decree rendered by that Court.

Morris v. *Colton*, 75 U. S., 511.

4. (*a*) The offense charged is not infamous, and appeal lay to the Circuit Court of Appeals.

"If the imprisonment be for a longer period than one year, (Section 5541), the sentence of imprisonment may be executed in a State prison or penitentiary, the rules of which prescribe hard labor."

In Re Mills, 135 U. S., page 266.

"We cannot doubt that at the present day imprisonment in a State prison or penitentiary with or without hard labor is an infamous punishment."

Mackin v. *U. S.*, 117 U. S., pages 348–352.

In *Ex parte Wilson*, 114 U. S., 417 and 426, it was said that in determining whether a crime was infamous within the mean-

ing of the Constitution, the question is whether it is "one for which the Statute authorizes the Court to award an infamous punishment, not whether the punishment ultimately awarded was an infamous one."

"A sentence simply of imprisonment in the case of a person convicted of an offense against the United States, where the Statute prescribing the punishment does not require that the accused shall be confined in a penitentiary, cannot be executed by confinement in a penitentiary except in cases in which the sentence is for a period longer than one year."

In Re Mills, 135 U. S., 270.

"Instead of confinement in ordinary county prison, where he and his friends reside, where they may be under the control of the Sheriff, see him and visit him, where the Sheriff and his attendants must see him, where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this Court has judicially decided in *Ex parte Wilson* in 114 U. S., page 417; *Mackin* v. *U. S.*, 117 U. S., page 348; *Parkinson* v. *U. S.*, 121 U. S., 281; and *United States* v. *De Walt*, 128 U. S., 393, is itself an infamous punishment."

Medley, Petitioner, 134 U. S., 168.

"The prosecution was under Sections 5511 and 5512 of the Revised Statutes, which made the offenses charged punishable by fine of not more than five hundred dollars or by imprisonment not more than three years; the Court can order that it shall be in the Penitentiary.—Rev. Stat. Sec. 5541. This made the crime "infamous" within the meaning of the 5th amendment of the Constitution of the United States, and the prosecution should have been by indictment and not by information."

Parkinson v. *United States*, 121 U. S., 281.

"The test is, whether the crime is one for which the Statutes authorize the Court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one; when the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury. What punishment shall be considered as infamous may be affected by the change of public opinion from one age to another, and for more than a century imprisonment at hard

labor in a State prison or penitentiary has been considered an infamous punishment in England and America."

Mackin v. *United States*, 117 U. S., 351.

By the express provision of an Act of Congress, either a sentence to imprisonment for a period longer than one year, or a sentence to imprisonment and confinement to hard labor, may be ordered to be executed in a State prison or penitentiary, and a convict while thus imprisoned is subject to the same discipline and treatmentas convicts sentenced by the Courts of the State—Revised Statutes, Sections 5541, 5542, 5539; *Ex Parte Karstendick*, 93 U. S., 396.

By the Act of June 17th, 1870, 16th Statutes, 153, infamous crimes are in the most explicit words defined to be those punishable by imprisonment in the penitentiary.

Idem, 354.

The question is whether the crime is one for which the Statutes authorize the Court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one."

Ex Parte Wilson v. *United States*, 114 U. S., page 436.

A crime the punishment for which is a term of years is an infamous one.

Idem, 428, 429.

(See *U. S.* v. *Waller*, 1st Sawyer, 701, as to offenses not infamous.)

(*b.*) "The fallacy which underlies this argument is the assumption that the Act of 1891 contemplates several separate appeals in the same case and at the same time to two appellate Courts. No such provision can be found in the Act, either in express terms or by implication. The true purpose of the Act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in Section 7 of the Act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court."—*McLish* v. *Roff*, 141 U. S., page 668.

II.

Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment.

We accept the decision of this Court as pronounced in *Carter* v. *Bennet*, 56 U. S., 356, and approved in *Bond* v. *Dustin*, 112 U. S., 608, that "upon a motion in arrest of judgment the Court cannot look beyond the record, and the judgment cannot be arrested, unless there is error in law, or defect of jurisdiction apparent in the proceedings."

We based our motion entirely upon the record, as the transcript filed in the Circuit Court of Appeals shows. We adduced nothing *dehors* the record. The presiding Judge (Hon. W. H. Brawley) was judicially cognizant of his own tenure and of the conditions which constituted the legal status. No facts were necessary to be adduced, and none were suggested. It was purely a question of law as to the legality of the Court.

The following statement of the record is conclusive of this:

On January 30th, 1894, Hon. Charles H. Simonton was Circuit Judge of Fourth Circuit.—Transcript, pages 1 and 2.

On February 12, 1894, Hon W. H. Brawley was appointed and qualified as U. S. Judge for the District of South Carolina.—*Idem*, page 2.

The Court was begun to be holden at Greenville, S. C., on the first Monday in February, 1894.—*Idem*, page 3.

The presiding Judge was Honorable A. S. Seymour, of the District of North Carolina, appointed by Circuit Judge Simonton, because of the "accumulation of business and urgency for the transaction thereof."—*Idem*, page 1.

The indictment was found and defendant convicted at this term.—*Idem*, pages 3, 4 and 5.

The Court takes judicial cognizance of the Acts of Congress and of the Revised Statutes of the U. S. They are not offered in evidence.

If the error which plaintiff assigns is not "apparent upon the record," it appears nowhere. The existence of the conditions which we allege as fixing the illegality of the Court is not questioned. We rely upon nothing else.

Supreme Court, U. S.
FILED.
OCT 15 1895
JAMES H. MCKENNEY,
CLERK.

30

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

A. F. McDOWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 552.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

A. F. McDOWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 552.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This cause comes upon a certificate from the Court of Appeals for the fourth circuit, submitting certain questions of law for instruction.

South Carolina has but one district judge. From January 1, 1894, to February 12, 1894, there was a vacancy in the office of district judge.

A regular term of the district court is by law to be held on the first Monday of February, which, in 1894, fell on the 5th day of the month.

On January 30, 1894, a circuit judge of the circuit, which includes South Carolina, appointed the Hon. Augustus S. Seymour, judge of the district court of the United States for the eastern district of North Carolina in the same circuit, to hold the regular term of the district court, beginning on the first Monday of February, 1894, at Greenville, S. C.

The order of appointment recited that the clerk of said district court had certified that there was such an accumulation of business and urgency for the transaction thereof in said district that the public interests required the designation and appointment of a district judge to hold said court.

In pursuance of said order the Hon. Augustus S. Seymour held said regular term from February 5, 1894, to February 12, 1894, on which day the Hon. William H. Brawley, duly appointed and qualified as judge for said district, began to hold said court, and so continued until the conclusion of the proceedings affecting this case. (Rec., p. 1.)

On February 16, 1894, an indictment was returned into said court against A. F. McDowell, who was tried, and on February 22, 1894, was found guilty. After a motion for a new trial was made and overruled, and before sentence, a motion was made in arrest of judgment, on the ground that the indictment had been found and the subsequent proceedings had thereon at what was not a lawful term of court, and that they were void. (Rec., p. 2.)

This motion was overruled and McDowell was sentenced to fine and imprisonment.

The making of the motion in arrest and its disposition appear in the record in a bill of exceptions, which refers to the indictment as found by the grand jury impaneled at the special February term of said court at Greenville, at the district aforesaid, and the statement of matter upon which the motion in arrest was founded commences:

"At the opening of the special February term, 1894, of said court, that being the term at which said indictment was found." The record nowhere discloses the calling of any special term as such. (Rec., p. 2.)

The certificate shows that the regularly appointed judge began to hold court on February 12, 1894, and that he continued to hold throughout these proceedings, and that McDowell was not indicted until February 16, 1894, and that he was tried February 21, 1894.

It does not appear from the statement when the grand jury was impaneled. It may be assumed that it was done at the beginning of the term and under the pro tempore judge. Therefore, the real ground of McDowell's complaint is that he was indicted by a grand jury unlawfully organized.

POINTS AND ARGUMENT.

I.

The first question submitted is as follows:

"Whether plaintiff in error was indicted, convicted, and sentenced at a lawful term of the district court for the district of South Carolina and the western district thereof, sitting at Greenville, as set forth in this certificate?"

The motion to arrest must be founded on the proposition that the circuit judge had no power to appoint the district judge, because the office of district judge was vacant when the appointment was made, and that the court was begun under a person assuming to be judge, without lawful authority, and that this rendered the subsequent proceedings void.

No significance should be attached to the reference in the bill of exception to the "special term." The court began at the time fixed by law for the regular term, the certificate of the clerk was that the public interests required the appointment of a judge "to hold the regular term," and the order of appointment which recited the certificate was "to hold and preside over the said term of court."

The certificate shows that the record nowhere discloses the calling of any special term.

Inaccurate expressions get into bills of exception, which are prepared always by counsel and frequently in haste under the pressure of business.

No such recital could avail to overcome the facts above set out.

The judge was special, but the term was regular.

Term has reference to time, and not to the character of appointment of the judge. It was a regular term or no term, according to the fact whether there was a judge or not; and this depends upon the power of the circuit judge to make the appointment under the facts set out.

From time to time statutes have been passed to secure the efficiency of the district courts.

There has been a constant evolution to meet the necessities as experience demonstrated them and the insufficiency of the existing law.

Section 6 of the judiciary act of 1789 (1 Stat., 76) provided—

> and that a district court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to such day, antecedent to the next stated session of the said court, as in the said order shall be appointed, and in case of the death of the said judge, and his vacancy not being supplied, all process, pleadings, and proceedings of what nature soever pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor.

This provides only for adjournment in case of the inability of a judge to attend, and in *case of a vacancy by death* for a continuance until the appointment and acceptance of the office by his successor. (This provision, as modified by the act of August 6, 1861, is the basis of section 602, Revised Statutes.)

The activity of the court was in either case absolutely suspended and litigants suffered a denial of justice.

The act of March 26, 1804 (2 Stat., 291), likewise provided only for adjournment.

On March 2, 1809, was passed "An act to amend the judicial system of the United States." (2 Stat., 534.)

This act only provided for certifying the cases pending in the district court to the next regular term of the circuit court to be holden in the district.

There was no provision for holding the district court or for trying the causes pending therein at the regular term, and as business accumulated in the Federal courts there was a practical denial of justice in cases of disability or death of district judges.

In 1850 was passed "An act to provide for holding the courts of the United States in case of the sickness or other disability of the judges of the district court." (9 Stat., 442.)

This act (which is carried into sections 591, 593, 594, 595, and 596, Revised Statutes) provides, "in cases of the sickness or other disability of any district judge," for the appointment of any district judge within the same circuit to "hold the district or circuit court in case of the sickness or absence of the circuit judge in the place of and discharge all the judicial duties of the district judge who may be sick or otherwise disabled as aforesaid while such sickness or other disability shall continue."

On April 2, 1852 (10 Stat., 5), was passed an act amending the act of 1850, and providing that the appointment of a district judge provided for in said act might be made—

> Whenever, on the certificate of the clerk of the circuit or district court, under the seal of the court, it shall be made to appear, to the satisfaction of such judge or chief justice, that the public interests, from the accumulation or urgency of judicial business in any district, shall require it to be done; and the district judge so designated and appointed shall have and exercise the same powers within such district as if the district judge resident therein were prevented by sickness or other disability from performing his

> judicial duties; and it shall be lawful in case of such appointment for each of the said district judges separately to hold a district or circuit court at the same time in such district, and discharge all the judicial duties of a district judge therein, but no such district judge shall hear appeals from the district court.

This act is carried into the Revised Statutes in section 592.

On January 23, 1858, Mr. Attorney-General Black gave an opinion that the act of July 29, 1850, only provided for appointment "in case of the sickness or other disability of any district judge," and that it did not extend to a case of vacancy. (9 Opin., 131.)

His opinion did not consider the effect of the act of April 2, 1852.

Three years thereafter, on August 6, 1861, was passed "An act to provide for holding the district and circuit courts in judicial districts during a temporary vacancy of the judgeship." (12 Stat., 318.)

There is no reason for concluding that this act was passed in acquiescence in the opinion of Attorney-General Black.

It only applied to States where there were two judicial districts, and its manifest purpose was to provide that in case of a vacancy in one of the district judgeships, the other district judge might, *without appointment*, hold the district court and the circuit court also, in case of sickness or the absence of the circuit judge.

After 1865 there was an immense increase in the business of the Federal courts, civil and criminal, as a result

of the growth of population, greater range in commercial activity, advance of manufacturing, extension of commerce between the States, the vast interests involved under the tariff and excise laws, and enlarged jurisdiction. The necessity of a more comprehensive provision providing for the interchange of judges and the prompt holding of the courts under all contingencies led to the enactment of section 3, chapter 113, acts 1871 (16 Stat., 494), which provides as follows:

> And it shall be the duty of the circuit judge in each judicial circuit, whenever in his judgment the public interest shall so require, to designate and appoint, in the manner and with all the powers provided in an act to provide for holding the courts of the United States, in case of the sickness or other disability of the judges of the district courts, approved July 29, 1850, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or aid of any other district judge within the same circuit.

This is carried into the Revised Statutes, section 596, as follows:

> It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section 591, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit; and it shall be the duty of the district judge, so designated and appointed, to hold the district or circuit [court] as aforesaid without any other compensation than his regular salary as established by law, except in the case provided in the next section.

Under this section the circuit judge *whenever in his judgment the public interest so requires* may appoint.

His reasons or the sufficiency thereof can not be inquired into. He has an absolute and uncontrollable discretion. If he should undertake to assign a reason for his action and it should be manifestly bad, nevertheless his exercise of the appointing power when executed could not be questioned any more than could the judgment of a court predicated upon an opinion palpably unsound.

In this case the circuit judge assigned as a reason for the appointment a certificate of the clerk reciting that there was such an accumulation of business and urgency for the transaction thereof that the public interest required the appointment.

The recital was in accordance with the requirements of section 591, and it is insisted that upon such a recital the circuit judge, under the authority conferred by that section, had the right to make the appointment. It is true that the language of the section and the act from which it was taken contemplates that the judge of the district court is in office and that the two judges may act concurrently. But that is a state of affairs in the conduct of the business which is provided for as an incident of the appointment. Its existence or nonexistence does not constitute any part of the conditions precedent to the right to appoint under that section.

The only condition is the certification that there is an accumulation or urgency of business and that the public interests require the appointment.

As to the cause of the existence of the urgency, whether from a vacancy or something else, no provision is made.

The clerk passes upon the state as it exists, and upon it bases his conclusion that the public interest requires the appointment. If the appointing judge is satisfied, nothing more can be required. His action is not subject to review at all, certainly not by what is a collateral impeachment, by questioning the validity of the acts of the judge who has been appointed and is in the exercise of the functions of the office. (*Cocke* v. *Halsey*, 16, Peters 87.)

The very fact of vesting this power in the clerk and not in the superior officer, the judge, is evidence that it was contemplated that the very necessity for invoking action might arise from the fact that there was no judge.

If there be any question of the power under section 591, there can be none under section 596.

If the power to make the appointment was conferred upon the circuit judge under any law and was exercised, his action will be sustained, even though the judge thought he was acting under a power granted by a different law, which did not in fact confer it.

In *Ball* v. *United States* (140 U. S., 128) Judge Boorman had not been appointed at all to hold the term of court which was questioned, and therefore on this point that decision has no special bearing, but this court, speaking through Mr. Chief Justice Fuller, in discussing the acts conferring the power of appointment said:

> Under section 596, Revised Statutes, the circuit judge, *whenever in his judgment* the *public interest so required*, could designate and appoint, in the manner and with the powers provided in section 591, the district judge of any judicial district within his circuit

to hold the district or circuit court *in place of, or in aid of*, any other district judge within the same circuit.

If, in the Ball Case, there had been any appointment to the term in question, no matter upon what state of facts, then the point here raised as to the effect to be given to section 596 would have arisen directly. If the place of judge is vacant, then an appointment to fill it is necessarily "in place of" the judge who last held it. This is a more natural construction than to say the appointment must be "in place of" a judge who is holding his place. In such case the appointment is "in aid of" the judge.

When the progression of the statutes pari passu with the public necessities, as experience developed them, culminating in the comprehensive language of section 596, is considered, it would require a very technical construction to hold that a district judge within the circuit can not be appointed to act in case of a vacancy.

Such a conclusion would stop the courts ~~in South Carolina, the State in question~~, Massachusetts, Minnesota, Maryland, Maine, Montana, Kansas, Idaho, Indiana, Colorado, Connecticut, Delaware, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wyoming, and Kentucky, which have but one judicial district, for sections 602 and 603, which provide for holding court in cases of vacancy, only apply in States which have two or more districts.

If a judge should die shortly after the adjournment of Congress in any of the States having but one district a long hiatus might and would probably intervene, for

there must be a new nomination when Congress convenes and a confirmation by the Senate, and even if the Executive should be willing to make an ad interim appointment, those worthy of the position would not be inclined to give up practice and risk the uncertainty of reappointment and confirmation, especially if the time should coincide with the retirement of an administration with an adverse Senate.

While an argument ab inconvenienti should not control construction, it is fair to assume that such conditions were contemplated by Congress in framing the act, and that the language used was adopted to avoid such mischievous results.

In holding that the judge in this instance was legally appointed under section 596 the letter and spirit of the law will be followed, no violence will be done to any language in the statute, the public interest of a people rapidly expanding in everything that the law affects will be subserved, and injury can accrue to no man, for judges already duly appointed and qualified are simply transferred, and in an exigency far more pressing than those provided for in sections 591 and 592.

II.

The second question submitted is as follows:

> Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment.

FIRST.

The objection came too late.

A motion in arrest of judgment is an application that no judgment be rendered on a verdict for some cause which must be apparent upon the face of the record. (Archbold's Crim. Pl. and Pr. (6th ed.), 178–31.)

It appears that without plea or objection defendant went to trial, put the Government to the expense incident thereto, took the chances for acquittal, and then after conviction raised for the first time, upon a motion in arrest of judgment, the question of the invalidity of the proceedings.

A motion in arrest of judgment will not be allowed for objections which should have been taken before the trial, and whether the motion be for a new trial or in arrest of judgment, it should not be allowed for defects which the defendant knew to exist before he went into trial and did not object to.

Thus irregularities in impaneling a jury or the acting of an incompetent juror can not be a ground for setting aside a verdict where they were, as in this case, before the trial began known to the defendant. (*Jordan* v. *Meredith*, 3 Yates, 318; *Howland* v. *Gifford*, 1 Pickering, 38, 43; *Aculeest* v. *Hadley*, 1 Pickering, 38; *State* v. *Haseall*, 6 N. H., 352.)

In *United States* v. *Gale* (109 U. S., 65) this court held that though the grand jury be impaneled under a law claimed to be unconstitutional, a defendant who does not move to quash or plead in abatement, but pleads not

guilty to the indictment and goes to trial, can not on motion in arrest of judgment raise the question, saying:

> If it could be taken advantage of on a motion in arrest of judgment it would be a good ground of reversal on error, and all the proceedings of a long term might be rendered nugatory by admitting a person to the grand jury or excluding a person from it without the matter being called to the attention of the court; whereas, if the objection were taken *in limine*, the irregularity might be corrected by reforming the panel or summoning a new jury.

Objection to the authority of one who is not a mere usurper and who, supposing himself to be invested with the office, is acting as judge in good faith, must be made before the trial or it will be disregarded. (*Case* v. *State*, 5 Ind., 1; *State* v. *Anoni*, 2 Nott & McC., 27.)

In *Radford Trust Co.* v. *Lumber Co.* (92 Tenn., 136, 137), Lurton, J., said:

> One may consent to a trial before a disqualified judge, and if he fail to object he is conclusively presumed to consent. The right to waive a right is the highest of all rights.

SECOND.

Even if the court were organized and the grand jury were impaneled under a judge unlawfully appointed, yet, being a de facto judge of a de jure court, the validity of his acts can not be questioned in this proceeding.

An officer *de facto* is one who, although he is not a true and rightful incumbent of the office, yet is no mere usurper, but holds it under color of lawful authority. (*The King* v. *The Corporation of the Bedford Level*, 6

East, 356; *Brown* v. *O'Connell*, 36 Conn., 45; *Brown* v. *Lunt*, 37 Maine, 428; *Plymouth* v. *Painter*, 71 Conn., 587; *Black on Judgments*, § 175.)

In considering this question a distinction must be observed between cases where there was no de jure office to be filled. In such cases the rule here invoked does not apply, as for instance in *Hildreth* v. *McIntire* (1 J. J. Marshall, 208) and in *Norton* v. *Shelby County* (118 U. S., 425), in which this court, following the supreme court of Tennessee in *Pope* v. *Phifer* (3 Heisk., 691) and other cases, as authoritative in construing the constitution and laws of the State, held that the offices in question did not exist de jure, and that consequently there could be no de facto incumbents.

While this case was distinguished by the court as falling under a different rule, it declared the doctrine in question as follows:

> The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in

> question. But the idea of an officer implies the existence of an office which he holds (pp. 441, 442).

Again:

> Where an office exists under the law it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office and exercises its powers and functions, (pp. 444–445.

To same effect are *Cocke* v. *Halsey* (16 P., 87) and *County of Ralls* v. *Douglas* (105 U. S., 730), in which Mr. Chief Justice Waite said:

> His right to the office is one thing; his action while exercising the duties of the office another.

In re Manning (139 U. S., 505), which was a criminal case, while the decision followed as binding, the adjudication of the supreme court of Wisconsin to the effect that a judge, acting under an appointment made without authority, was a de facto judge, whose acts were valid while he exercised the office; yet it is manifest that this conclusion could not have been reached in considering the fourteenth amendment had such decisions of the supreme court of Wisconsin done violence to the principles of sound jurisprudence.

The case of *Ball* v. *United States* (140 U. S., 118) seems conclusive of this question.

Judge Sabin, United States district judge, being ill, the circuit judge appointed Judge Boorman to hold his court at Galveston for the November term, 1888, and also for the terms in 1889 for the eastern district of Texas.

At this time the law provided for holding court at Galveston, Tyler, and Jefferson. By an act of March 1, 1889, two separate terms of court were provided for at Paris in the same district. Without any new appointment Judge Boorman held the court at Paris for the October term, 1889. At this term Ball was indicted, tried, and convicted. Judge Sabin died in March, 1890, and Judge Boorman, without any new appointment, held a term of court beginning on the third Monday of April, 1890, until the 2d day of June, 1890, when Judge Bryant was sworn in as Judge Sabin's successor, and held court at Paris. On the 5th of May, 1890, Judge Boorman presiding, defendants made a motion in arrest of judgment on the ground that Judge Boorman had acted throughout the case without lawful authority. The motion was overruled and sentence was pronounced.

The case was reversed on other grounds, but on this question Chief Justice Fuller said:

> We are of opinion that the irregularities alleged did not place Judge Boorman, in holding the October term, in any other position than that of a judge *de jure*, and that as to the April term, he was judge *de facto* if not *de jure*, and his acts as such are not open to collateral attack (pp. 128–129.)

The atack was collateral because the judge was not a party, and it impeached his right to hold the court, which was based on a legal status fixed by a procedure antecedent to and independent of the case at bar.

This conclusion is in line with the accepted doctrine, based on sound principles of public policy, that the

authority of a *de facto* judge can not be called in question collaterally. His title to the office can not be called in question except in some proceeding instituted for that purpose. His judgments and acts are valid and binding. And this is so, even though he should be disqualified under the Constitution to hold the office or should be appointed under an unconstitutional law to fill a *de jure* office. (*In re Ah Lee*, 6 Sawyer, 420.)

Alabama:
Masterson v. *Matthews*, 60 Ala., 260.
Connecticut:
Brown v. *O'Connell*, 36 Conn., 432;
State v. *Carroll*, 38 Conn., 449.
Indiana:
The State v. *Murdock*, 86 Ind., 124;
Baker v. *Wambaugh*, 99 Ind., 312.
Maine:
Brown v. *Lunt*, 37 Me., 423;
Johnson v. *McGindy*, 76 Me., 432.
Massachusetts:
Fitchburg Railroad v. *Grand Junction Railroad*, 1 Allen, 552, 558;
Commonwealth v. *Kirby*, 2 Cush., 577, 581;
Sheehan's Case, 122 Mass., 445. This was a criminal case and the opinion was by Gray, chief justice.
Minnesota:
Carli v. *Rheuer*, 27 Minn., 292;
Burt v. *W. & St. P. R. Co.*, 31 Minn., 472.
Montana:
Carland v. *Commissioners*, 5 Mont., 579.
Nevada:
Mallett v. *U. S. G. & S. M. Co.*, 1 Nev., 188.

New York:
M'Instry v. *Tanner*, 9 Johns., 135;
Wilcox v. *Smith*, 5 Wend., 231;
People v. *White*, 24 Wend., 539;
Ostrander v. *People*, 29 Hun., 513;
Pepin v. *Lachenmeyer*, 45 N. Y., 27.
North Carolina:
Gilliam v. *Reddick*, 4 Iredell, 368.
Ohio:
State v. *Alling*, 12 Ohio, 16;
Ex parte Strange, 21 Ohio St., 610.
Oregon:
Hamlin v. *Cassafer*, 15 Oregon, 456.
Pennsylvania:
Campbell v. *Commonwealth*, 96 Pa. St., 344.
South Carolina:
Cromer v. *Boinest*, 27 S. C., 436.
Tennessee:
Blackburn v. *State*, 3 Head, 690;
Holmes v. *Eason*, 8 Lee, 759.
Vermont:
McGregor v. *Balch*, 14 Vt., 428.
Virginia:
McCraw v. *Williams*, 33 Grattan, 510.
Wisconsin:
State v. *Bloom*, 17 Wisc., 521.

It is respectfully submitted that the first question should be answered in the affirmative, and the second in the negative.

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